SERVED: November 4, 1998

NTSB Order No. EA-4716

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of October, 1998

Application of JAY C. HANEY for an award of attorney fees and expenses under the Equal Access to Justice Act.	)	Docket 230-EAJA-SE-14003

OPINION AND ORDER

The Administrator has appealed from the written initial decision of Administrative Law Judge William A. Pope, II, served on May 28, 1996, granting, in part, Mr. Haney's application for attorney fees and other expenses, pursuant to the Equal Access to Justice Act (EAJA, 5 U.S.C. § 504).[1] As discussed below, we reverse the law judge's decision and deny the EAJA application.

At the hearing on the merits, held November 30, 1995, the law judge affirmed the sole violation of the Federal Aviation

[1]A copy of the initial decision is attached. The applicant did not appeal the partial fee award. The Administrator filed an

Regulations (FARs) alleged, finding that the applicant, prior to a December 8, 1994 flight, did not give a full passenger briefing, in contravention of 14 C.F.R. § 135.117(a). Although he found that the Administrator established the charge by a preponderance of the evidence, the law judge reduced the sanction from the 10-day suspension of the applicant's airline transport pilot certificate to a $250 civil penalty, citing as justification several procedural errors committed by the Administrator in the prosecution of this case.

A summary of the events that preceded the November 30, 1995, hearing is warranted here. As previously mentioned, applicant was pilot-in-command of a Piper Navajo operated by Frontier Flying Service on December 8, 1994, under the regulations of 14 C.F.R. Part 135. FAA airworthiness aviation safety inspector Robert Haxby was one of five passengers on board that flight from Kotzebue to Fairbanks, Alaska. Mr. Haxby noticed that the applicant gave an incomplete pre-flight briefing and, after the flight, advised the applicant of his observations.

Within a week, Mr. Haxby met with the applicant and another FAA inspector to discuss the matter. He also sent a letter to the applicant informing him that the FAA was investigating the insufficient pre-flight briefing of December 8th and other unspecified incidents involving weight and balance discrepancies that occurred in November 1994. The applicant responded to the allegation of inadequate pre-flight briefing, by letter received

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appeal brief, to which the applicant replied.

December 27, 1994, wherein he stated that he had asked if any of the passengers had questions and believed that they understood the aircraft's safety features.

On February 8, 1995, the Administrator issued to applicant a Notice of Proposed Certificate Action that referenced the pre-flight briefing, described the flight as one from Kotzebue to Fairbanks, but erroneously stated that the flight took place on November 11, 1994. The sanction sought was a 10-day suspension. This notice was followed by an order of suspension, issued on February 24, 1995, which not only gave November 11th as the date of the flight, but also sought a 30 rather than a 10-day suspension.[2] The applicant filed an appeal simply "deny[ing] the violations alleged."[3]

On August 22, 1995, one day before the scheduled hearing, counsel for the Administrator discovered the wrong date mentioned in the complaint, notified applicant's counsel, and, at the start of the hearing, moved to amend the complaint to substitute December 8th for November 11, 1994, and to correct the suspension sought from 30 to 10 days.

The law judge ruled that the use of the incorrect date was unintentional error and its correction would not change the

[2]The order also cited the wrong aircraft registration number. This error was corrected, without opposition, on November 30, 1995.

[3]In his response to the law judge's pre-hearing discovery order, the applicant stated that he would be the only witness at hearing and would testify to the events of November 11, 1994.

nature of the alleged violation.[4] He continued the case, sua sponte, until November 30, 1995, to give the applicant adequate time to prepare a defense. He also denied the applicant's motion to dismiss the amended complaint as stale, finding that the Administrator did not intend to allege a new offense through the amendment of the complaint, and the applicant had sufficient notice of the charge against him. Written Order of Law Judge, dated November 27, 1995.

At the close of the November 30th hearing, the law judge found the charge proved by a preponderance of the evidence but, taking into consideration "the Administrator's careless handling of this case," and noting that "[t]he Respondent has already paid a substantially higher penalty for his actions than would have been the case if this case had been handled with reasonable care and dispatch[] by the Administrator," modified the sanction from a 10-day suspension to a $250 civil penalty.[5] (11/30/95, Tr. at 63.)

As for the EAJA application, the law judge awarded the applicant attorney fees and expenses that arose between February 24, 1995 (Suspension order issued) and August 23, 1995 (Suspension order amended), based on his finding that the Administrator "did not have a reasonable basis in fact" for

[4]The law judge described it as "inadvertent error, rather than an intentional changing of the date based upon some other incident which the FAA might have been confusing this incident with." (8/23/95 Transcript (Tr.) at 66-67.)

[5]The Administrator filed, but subsequently withdrew, an appeal of the initial decision. NTSB Order No. EA-4420 (1996).

alleging that the applicant violated FAR section 135.117(a) on November 11, 1994, and the applicant was a prevailing party on the issue "because he won 'a significant and discrete substantive portion of the proceeding.'"[6] EAJA Initial Decision at 6, quoting 49 C.F.R. § 826.5(a). He explicitly found that the applicant was not a prevailing party on the issue of sanction.

The Administrator argues in this EAJA appeal that the award of EAJA fees is inconsistent with the law judge's prior rulings in the case, especially since the law judge, by concluding that the amendment to the complaint did not change the nature of the alleged violation, found, in essence, that the original complaint and the amended complaint both referred to the same incident. The Administrator further contends that, after finding the

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[6]The law judge further stated,

> Through careless drafting errors by the Administrator ... the Applicant was on notice from the erroneous pleadings that he had to prepare to defend himself against the completely unfounded charge that he violated § 135.117(a) on or about November 11, 1994. *The Applicant unquestionably prevailed on this issue*, because ultimately, but not until the day before the scheduled hearing, counsel for the Administrator, apparently for the first time, realized the errors in the pleadings, and moved to amend the Complaint to correct the date of the alleged offense and the duration of the suspension.... [T]he misstatement of the date of the alleged offense appears to have substantially prejudiced the Applicant by unnecessarily and unduly protracting the proceeding.

EAJA Initial Decision at 6 (emphasis added).

However, the law judge also found that the Administrator had "a reasonable basis in fact and law for proceeding under the legal theory that the Applicant violated § 135.117(a) of the [FARs] on or about December 8, 1994, by failing to give the

charges in the amended complaint supported by a preponderance of the evidence, the law judge erred in naming the applicant as the prevailing party on the allegations set forth in the original complaint.

Under the EAJA, the government must pay certain attorney fees and costs to the prevailing party, unless the government can show that its position was substantially justified, or that special circumstances make an award of fees unjust. 5 U.S.C. § 504(a)(1). If an applicant has prevailed in a significant part of the proceeding, he will be awarded partial fees, unless the government can demonstrate substantial justification for its position on that segment of the proceeding.[7] See Swafford and Coleman v. Administrator, NTSB Order No. EA-4426 (1996).

In the instant case, the applicant did not prevail in a significant or substantive portion of the proceeding. The law judge, in an unchallenged decision, found that the original and the amended complaints represented the same incident and the same violation. He declined to dismiss the case, as applicant sought. He then found that the applicant committed the violation as alleged (albeit in a corrected complaint). Again, this decision was not appealed and thus became final. Consequently, there is no basis in the record to conclude that the applicant prevailed. The law judge apparently was concerned with the "prejudice"

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complete required pilot briefing." EAJA Initial Decision at 5.

[7]To recover fees, the applicant must prevail on "a significant and discrete substantive portion of the proceeding."

arising from errors in the initial complaint, but he found that the corrected complaint did not *unduly* prejudice the applicant, and that the Administrator proved the FAR violation by a preponderance of the evidence. In any case, this expressed concern cannot be equated to applicant's having "prevailed" in any respect.

We agree with the law judge's determination that the applicant is not a prevailing party on the subject of sanction. He correctly distinguished this case from Gilfoil v. Administrator, NTSB Order No. EA-3982 (1993), noting that the instant case was not simply litigation over sanction. See also Swafford and Coleman at 5. In any event, a mere reduction in suspension period does not, per se, make an applicant a prevailing party. See Grzybowski v. Administrator, NTSB Order No. EA-4413 at 3, n.3 (1995). Further, there is no evidence to suggest that the 10-day suspension sought by the Administrator was excessive. See similarly, Application of Finnell, NTSB Order No. EA-4427 (1996).

Since we have found that the applicant is not a prevailing party, a review of whether the Administrator was substantially justified is not necessary.

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49 C.F.R. § 826.5(a).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and

2. The initial decision and order of the law judge granting, in part, the application for attorney fees and related expenses is reversed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. Member HAMMERSCHMIDT submitted the following statement:

> Although I have joined in the majority's decision to deny an EAJA award in this case, I have done so reluctantly, for there is, I think, a compelling equity in the matter that, even if it does not technically justify an award, favors a disposition that holds the Administrator accountable for the costs to the applicant that the errors in the original complaint caused. But for the Administrator's eleventh hour corrections, the applicant would have doubtless been the prevailing party, at least arguably entitled to his attorney fees through the dismissal of the defective order (incorrect aircraft number and date of alleged infraction). While I recognize that the applicant could not be a "prevailing party" within the meaning of the EAJA statute once the law judge permitted the amendment of the complaint and subsequently sustained the charge, I find an unsettling imbalance in a case that sanctions an airman for his procedural carelessness (failure to give a complete passenger briefing), but imposes no consequence for such carelessness committed by the Administrator.